82-2028

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. _____

PAUL ARNOTT, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Barry L. Moon, Attorney
BARRY L. MOON, P.C.
Attorney for Petitioner
14292 Fenton Road
Fenton, Michigan 48430
Telephone: 313-629-8801

QUESTIONS PRESENTED

1. Can the Court below find as a matter of law that petitioner's right to confrontation was violated but that no fundamental right was violated, and in the same ruling find as a matter of fact that petitioner's entrapment defense was specious where the unlawfully withheld confrontation testimony would have been the basis upon which the petitioner would have presented the defense of the entrapment?

2. Does this beg the constitutional question?

3. Were petitioner's due process rights violated by being deprived of the testimony of the known government informant; by the admission of hearsay evidence before a conspiracy could be established by a preponderance of the evidence; by the admission of guns into evidence where no gun offense was charged?

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REFERENCES:

Brief by W. Robert Chandler on behalf of Alphonse Bartkus in United States v Stephens, 492 F.2d 1367 (1974)

Brief by Charles A. Grossmann on behalf of Sandra Hancock in United States v. Arnott, Hancock, Williams

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Paul Arnott, Petitioner, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on April 8, 1983.

DECISIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is not yet reported. In the United States District Court for the Eastern District of Michigan, Southern Division, no opinion was issued. The opinion of the Court of Appeals and the Judgment of the District Court are appended hereto as Appendices A and B, respectively.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on April 8, 1983. This Court's jurisdiction to review that judgment is conferred by Title 28 United States Code, Section 1254 (1).

QUESTIONS PRESENTED

1. Can the Court below find as a matter of law that petitioner's right to confrontation was violated but that no fundamental right was violated, and in the same ruling find as a matter of fact that petitioner's entrapment defense was specious where the unlawfully withheld confrontation testimony would have been the basis upon which the petitioner would have presented the defense of the entrapment?

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FEDERAL CONSTITUTIONAL AND STATUTORY PROVISIONS AND FEDERAL RULES INVOLVED

The pertinent text of the Federal Constitution. Statutory and Regulatory provisions and the Federal Rules involved is set forth in Appendix C attached hereto. The citations to said provisions are as follows:

Fifth Amendment

Sixth Amendment

Federal Rules of Evidence:

104 (a), 104 (b), 401 and 403.

STATEMENT

I.

Petitioner, Paul Arnott, hereafter Arnott or petitioner, was convicted by a jury on all counts of a multi-count indictment in the U.S. District Court for the Eastern District of Michigan, Southern Division-Flint.

A nine count indictment was returned by the grand jury against seven individuals, Arnott, Ronald Conn, hereafter Conn, Bruce Burdwood, O'Neil Williams, Ronald Conn, Jr., Sandra Hancock, and Kathy Conn, on August 18, 1981. The indictment charged violations of 21 U.S.C. 841 (a) (1), 843 (b), 846; 18 U.S.C. 2 (a) and App. 1202 (a)(1).

In Count One, Arnott, Conn, Burdwood, Williams R. Conn, Jr., and Hancock were charged with conspiring to possess with intent to distribute and to distribute cocaine in violations of 21 U.S.C. 841 (a)(1) and 846.

In Count Two, Arnott, Conn, Hancock and K. Conn were charged with conspiring to manufacture phencyclidine (PCP) in violation of 21 U.S.C. 841 (a)(1) and 846.

In Count Three, Arnott, Conn, Burdwood and Hancock were charged with the distribution of cocaine and aiding and abetting in violation of 18 U.S.C. 2(a) and 21 U.S.C. 841 (a)(1).

In Count Four, Arnott was charged with using a communication facility to facilitate the distribution of cocaine in violation of 21 U.S.C. 843(b).

In Count Five, Conn was charged with using a communication facility to facilitate the distribution of cocaine in violation of 21 U.S.C. 843(b).

In Count Six, Hancock was charged with using a communication facility to facilitate the distribution of cocaine in violation of 21 U.S.C. 843(b).

In Count Seven, Williams was charged with an attempt to possess with intent to distribute cocaine in violation of 21 U.S.C. 841(a)(1) and 846.

In Count Eight, Williams was charged with using a communication facility to facilitate the distribution of cocaine in violation of 21 U.S.C. 843(b).

In Count Nine, Conn was charged with being a felon in possession of a firearm in violation of 18 U.S.C. App. 1202 (a)(1).

At the commencement of trial on November 24, 1982, charges had been dismissed as to Ronald Conn, Jr., and Kathy Conn. Conn pleaded guilty to the Counts with which he was charged and although Burdwood was indicted, he was never arrested.

On December 9, 1981, trial ended. Before submitting the case to the jury, the Court dismissed the charges against Williams in Counts One and Eight, and reduced Count Seven to the lesser included offense of attempt to possess cocaine.

On December 10, 1981, the jury returned verdicts of guilty as to Arnott, Hancock and Williams on all Counts with which they were then charged.

On January 19, 1982, Arnott was sentenced to imprisonment for a term of eight (8) years for each of Counts One, Two and Three and two (2) years for Count Four. Each term to be served concurrently along with a state sentence

for parole violation. Parole eligibility to be under the provisions of 10 U.S.C. 4205 (b)(2), at such time as the Parole Commission may determine, to be followed by a Special Parole Term of five (5) years for Count Four.

On April 8, 1983, the United States Court of Appeals for the Sixth Circuit affirmed Arnott's conviction.

II

PETITIONER'S PERCEPTION OF THE FACTS LEADING UP TO TRIAL

Significant events preceding Arnott's involvement with the alleged co-conspirators.

In early 1970 Arnott was severely injured in a serious car accident. During and after hospitalization, he was treated for pain with morphine then demeral. Experiencing an addiction to and dependence on these drugs, and experiencing continued pain when these drugs were discontinued, he turned to illegal narcotics. In 1973, Arnott sought treatment for heroin addiction at a methadone clinic but ceased treatment in 1975

because of frustration over his addiction to the methadone. In order to obtain money for his narcotics addiction Arnott resorted to armed robbery for which he was convicted in 1976.

Arnott's fortuitous meeting with alleged co-conspirator Ronald Conn

Upon release from incarceration in 1980, he was no longer ingesting any controlled substances illegally and shortly thereafter began working for H & P Excavating in Fenton, Michigan. It was at this time that he became associated with Conn who was interested in hiring H & P Excavating to do some work at his residence. A friendship developed out of their meeting, and Arnott occasionally visited Conn. As the excavating business began to slow down with the onset of winter, Arnott did odd jobs for Conn including driving his car, taking him to various places.

Arnott's fortuitous meeting with government informant, Joe Fronteira-Government Contract Agent.

In late November, 1980, upon visiting the

Conn residence, Arnott happened to meet Joe Fronteira, a confidential informant for the government, to whom he was introduced by Conn. At that time, Fronteira talked of get-rich-quick schemes including gambling, race fixing, narcotics, highjacking, extortion and prostitution.

Solicitations by Fronteira-Government Contract Agent

During a subsequent conversation, and implying that he was connected with "the well known Italian group", Fronteira spoke to Arnott of the possibility of getting him a real good job involving some of the schemes he had previously talked about. He also inquired whether he was willing to do armed robbery again, to which Arnott expressed total disinterest, at which point Fronteira further discussed selling narcotics. Some time later, Fronteira called Arnott at work and instructed him to come to Conn's house. Upon his arrival there, Conn and Fronteira took him to a secret room in the basement of Conn's residence which contained eight (8) twenty-pound bags of marijuana. Although

intially Arnott expressed unwillingness, Fronteira persuaded him to take some of the marijuana and try and sell it. Feeling uncomfortable in this situation, Arnott returned the marijuana the next day at which time he was further prevailed upon by Fronteira and Conn to be involved in the selling of drugs, cocaine in particular.

Fronteira-Government Contract Agent supplies cocaine, makes further solicitations concerning piperidine.

Shortly thereafter Fronteira delivered a quantity of cocaine to the Conn residence stating that he, Conn and Arnott would be partners, splitting the profit three ways. Fronteira stated that he could supply an unlimited quantity of any drug and also expressed his particular interest in using Conn's talents as a pharmisist for manufacturing phencyclidine (PCP). Fronteira stated that he could supply piperidine, a needed ingredient in making PCP, through a cop, who "was into it for the money".

Fronteira-Government Contract Agent

arranges meeting between Ronald Conn and undercover agent.

With Fronteira making the arrangements, and for the purpose of obtaining piperidine, on February 3, 1981, a meeting occurred between Ronald Conn and Sargent Robert Bertee, a Michigan State Police Officer working undercover. Bertee stated that he could supply piperidine and also inquired about buying cocaine from Conn. On the following day, Bertee arranged to meet with Conn in order to buy three ounces of cocaine. Arnott accompanied Conn and it was at that time that he met Bertee who was using the name James Robert Sutherland.

Subsequent meetings between Ronald Conn, Paul Arnott and Sargent Bertee.

From February 4, 1981, until April 4, 1981, there were several meetings and conversations between Sargent Bertee and Conn and Arnott to arrange the sale of piperidine and cocaine. During this time Sargent Bertee repeatedly explained to Arnott that he needed the money that would come from their dealings because of a break-up

in his family.

Law enforcement officers deliver piperidine to Arnott.

On March 11, 1981, Sargent Bertee and Thomas Krentler, Drug Enforcement Administration Special Agent, delivered a half gallon of piperidine to Arnott. In payment for the piperidine, Arnott agreed to supply Sargent Bertee with a kilogram of cocaine which he would obtain from a source in Florida.

Arnott delivers cocaine and is arrested.

On April 4, 1981, Sargent Bertee arranged for Arnott to deliver the kilogram of cocaine to him and Special Agent Gary Wade of the Drug Enforcement Administration at a motel in Flint, Michigan, at which time he was placed under arrest by Special Agent Wade. Arnott was not armed, nor did the vehicle which he drove contain any weapons.

III

PETITIONER'S PERCEPTION OF THE TRIAL PROCEEDINGS

Court refuses to allow defense witness to testify.

During the trial, in an attempt to call as witness, government informants, Joe Fronteira and Dennis Gerald Naylor, counsel requested a preliminary ruling by the Court in accordance with Rule 611 of the Federal Rules of Evidence limiting the subject matter of cross-examination to that brought up on direct examination. Both witnesses were willing to testify on behalf of Arnott if the scope of the examination were confined to certain questions as had been previously agreed upon. The Court denied the request despite counsel's proposal that it hear the questions beforehand to determine if such questions would in fact jeopardize the witnesses' 5th Amendment privileges against self incrimination, it being counsel's contention that they would not. The Court refused to even hear the questions at all. The Court stated that in order to make such a ruling it would have to actually hear the questions in the proper context, and it would have to know what the examination and cross-examination would be. The Court also denied a request for

immunity for Fronteira and Naylor. Further, the Court refused to allow counsel to even call the two informants as witnesses for the purpose of being identified and claiming their 5th Amendment privilege against self incrimination in the presence of the jury.

Court refused to require Ronald Conn to take the witness stand.

Counsel next requested that alleged co-conspirator Conn be compelled to testify over his claim of privilege against self incrimination, since he had already pleaded guilty to a charge brought against him regarding the subject matter of the present case. The Court denied this request also.

Firearms admitted into evidence.

At the trial, during the government's case-in-chief, counsel moved to exclude from the view of the jury, several firearms which the government had placed near its table.

The motion was granted since the firearms were not yet properly at issue and identified.

Counsel also moved, at that time, that the firearms be excluded entirely from the trial since Arnott was not armed when arrested and that the motel at which the arrest took place was approximately thirty (30) miles away from the Conn residence. Also, there was no evidence that Arnott resided permanently at the Conn residence.

The Court withheld its ruling on the motion until the guns were actually presented at which time the motion was denied.

Introduction of hearsay prior to proof of a conspiracy.

Prior to the commencement of the trial, the Court ruled to allow hearsay evidence under the co-conspirator exception subject to a subsequent demonstration of admissability pursuant to United States v Vinson, 606 F. 2d 149 (1979). Counsel for Arnott had a continuing objection to such evidence being admitted.

At the close of the government's case, a motion was made to strike the hearsay statements of the alleged co-conspirators because the govern-

ment had not met it's burden of showing a conspiracy under United States v Enright, 579 F. 2d 890 (6th Cir. 1978). This motion was denied.

A motion was made for directed verdict on all counts which the Court also denied.

Other facts are referred to hereafter in the Argument.

REASONS FOR GRANTING THE WRIT

The issues presented by this case where conspiracy was charged and entrapment was claimed, are One, the countervailing constitutional rights of a defendant to confront his accuser's privilege against self incrimination; Two, the right to confront a government informant who is knowing and willing to testify but fears self incrimination; Three, the violation of due process where hearsay is admitted under the co-conspirator exception prior to the establishment of a conspiracy by a preponderance of the evidence; and Four, the violation of due process where guns are used as evidence but no gun offense is charged and no gun or weapon of any kind is found on the defendant, or in his home and it is not shown that the defendant owns or possesses a gun.

In Dennis v United States, 384 U.S. 855, 873 (1966), this Court said:

> "A conspiracy case carries with it the inevitable risk of wrongful attribution of responsibility to one or more of the multiple defendants. Under these circumstances, it is especially important that the defense, the judge and the jury

should have the assurance that the doors that may lead to truth have been unlocked."

In the present case over defense objection, numerous hearsay statements by Conn were entered into evidence through Michigan State Police Sargent Robert Bertee from his telephone conversations with Conn and from his personal conversations with Conn alone and also with Conn and the Defendant, Arnott.[1] In an attempt to confront Conn regarding these statements and to establish some additional proof on the record as to Arnott's claim of entrapment, counsel for Arnott subpoenaed Conn to testify at the trial. Being too physically ill to be present at trial himself, Conn's attorney appeared in his behalf and informed the Court

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[1]Conn allegedly stated that Arnott was a "former associate of his", "Paul's the one I talked to you about last night. He is okay", "Paul had three ounces of coke out in the car with him", "Did you bring the coke with you?", "Paul had wanted him to charge an additional $50.00 an ounce for the three ounces", and "Paul was in Florida picking up the kilo of coke. . .".

that even if his client were physically able to appear in Court, they would claim the privilege of self incrimination under the 5th Amendment. Whereupon, the following colloquy between the Court and counsel for Arnott took place:

> THE COURT: Are you satisfied with that, as far as the record has made as to the claim of the privilege, Mr. Moon, or do you want Mr. Conn to be present to actually claim the privilege?
>
> MR. MOON: Your Honor, if the Court were, in response to Mr. Conn's assertion of the privilege, to grant an excuse for Mr. Conn on that basis, then certainly there's no reason to have him physically here.
>
> THE COURT: So you are satisfied that the claim of privilege is satisfactorily asserted <u>if it is, in fact, valid</u>?
>
> MR. MOON: Yes. However, I would like him physically here to assert the privilege in the presence of the jury because he has been described by witnesses, because I could ask him his name.
>
> THE COURT: If you show me some authority that authorizes you to do that or gives you the right to have him claim the privilege in front of the jury, then I will be glad to afford that right. You can do that between now and tomorrow morning.
>
> MR. MOON: I have an additional statement I wish to make. If the Court were to grant the assertion of privilege over my objection --

THE COURT: What is your objection?

MR. MOON: My objection would be this. Your Honor, Mr. Ronald Conn had pled guilty pursuant to a plea bargain. His plea has been accepted. It was for activity as alleged, places alleged and times alleged, as per this Indictment. And since the liability for those matters have been contracted under the Federal Rules, he could not increase his liability and his plea could not be withdrawn by him, been accepted by the court, that he would not have the right in these circumstances to assert the privilege.

THE COURT: How about income tax violation? Any immunity for income tax violation? Do you know of any barring of the United States between him, the United States and Mr. Conn?

MR. MOON: I don't know about the income tax liability. I don't know that -- his purpose for asserting --

THE COURT: I don't, either. The only way I could grant your request is to rule as a matter of law he may not or cannot incriminate himself. I can't rule as a matter of law that he could not incriminate himself.

MR. MOON: Your Honor, I don't believe the Court has before it any information that there would be income tax violations so I think that that's presuming something. (Emphasis added).

In Chambers v Mississippi, 410 U.S. 284, 302, (1973), this Court said: "Few rights are more fundamental than that of an accused to present witnesses in his own defense."

Citing Chambers, United States v Stephens, 492 F. 2d 1367 (5th Cir. 1974), held, inter alia, that the invocation of an assumed 5th Amendment privilege against self incrimination by an alleged co-conspirator who had pleaded guilty could not be used as a means of depriving the appellant of his 6th Amendment right to confront and cross-examinate his accuser; rather the declarant should have been required to take the witness stand and assert his privilege in response to particular questions.

In Stephens, which on its facts is strikingly similar to petitioner's case six defendants were indicted on charges of conspiracy to transport and dispose of stolen merchandise in interstate commerce, aiding and abetting, and various overt acts. One defendant was dismissed and another, Robert Kahn, pleaded guilty. The other defendants, Lee Stephens, Alfonse Bartkus, Milton Silverman and Sam Norber, were found guilty and were convicted.

At the trial, the government, through its witness, Sal Caracappa, introduced hearsay

statements made by Robert Kahn as statements by a co-conspirator made in the furtherance of the conspiracy. Objection was raised by defendant Bartkus on the grounds that there was no opportunity for a confrontation of Robert Kahn. The objection was overruled by reason that Kahn's attorney "informed the Court that he had advised Kahn that he had an absolute right to refuse to testify and that it would be a violation of his 5th Amendment rights to call him as a witness". In reversing the conviction of the defendant, the Court said:

> The statement by Caracappa that Kahn told him that his cargo would be stolen aspirin was clearly hearsay. Having admitted this testimony as the statement by one of the co-conspirators made in the furtherance of the conspiracy the Court erred in denying Bartkus the right to confront and cross-examine Kahn. Chambers v Mississippi, 410 U.S. 284, 93 S. Ct., 1038, 35 L Ed 2d 297 (1973). While Kahn's guilty plea to the federal charges did not deprive him of the right to assert his Fifth Amendment privilege against incrimination on any possible state charge, nevertheless, he should have been required to take the witness stand and assert the privilege in response to particular questions. United States v Seavers, 472 f 2d 607 (6th Cir. 1973). Then if Kahn refused to answer questions about his alleged statements to Carcappa that the aspirin was stolen, the Court had the responsibility to determine whether an answer could be required.

In both the Stephens case and the instant case, the error by the trial Court is the same. While Conn's guilty plea to the federal charges did not deprive him of the right to assert his Fifth Amendment p.ivilege against incrimination on any possible s.ate charge or federal income tax violation, nevertheless he should have been required to take the witness stand and assert the privilege in response to particular questions with the Court having the responsibility to determine whether an answer could be required. Stephens, supra.

The Court in the present case, absolutely forbade that Conn be called to testify thereby allowing him a blanket assertion of the Fifth Amendment privilege against incrimination when the Stephens case, supra, clearly requires that he testify as to non-incriminating matters. Defense counsel even indicated to the Court that questions directed to Conn would fall strictly within the parameters of the federal charges to which Conn had pleaded guilty.

In another case decided by the Sixth Circuit, United States v Seavers, 472 F.2d 607

(6th Cir. 1973), appellant was convicted of contempt for refusing to testify at the trial of his alleged co-conspirator. The appellant had pleaded guilty to federal charges involving transporting a stolen automobile from California to Ohio. His court-appointed attorney advised the trial judge that although his client had pleaded guilty to the federal charge of transporting, he was still subject to prosecution by the State of California for the manner in which the car was acquired and for operating the vehicle without the owner's consent. The Court held that Seaver's plea of guilty was a waiver of his Fifth Amendment right against self incrimination as it applied to "that crime" i.e., transporting a stolen vehicle across state lines. The privilege was upheld with respect to unauthorized use of credit cards during the transportation of the automobile, but the Court ruled that the witness would be required to answer questions with respect to the circumstances surrounding the transportation and acquisition of the automobile. In its opinion affirming the judgment of the trial Court,

Court of Appeals said:

> The privilege claimed by Seavers should have been upheld with respect to inquires concerning the manner in which the vehicle was acquired and its possession by him in California before the interstate journey began [But, as] we have held, the guilty plea waived the privilege as to the offense plead to . . .

Conn's alleged declarations characterizing Arnott were both "crucial" and "devastating", Dutton v Evans, 400 U.S. 87 (1970), in light of the Court's refusal to allow Conn to be called as a witness which deprived Arnott of even the possibility of corroborating his defense of entrapment leaving him alone and naked with only his own woefully lopsided account of the circumstances of his entrapment. Arnott was effectively deprived by the trial Court's ruling of the right to confront declarant Conn unless it can be said that he had no such right by virtue of the co-conspirator exception to the hearsay rule and the Fifth Amendment privilege against self incrimination.

We submit that the co-conspirator exception and the Fifth Amendment privilege against self incrmination do not prohibit a defendant from calling an available declarant to testify as

to matters to which the declarant has pleaded guilty.[2] Berger v California, 393 U.S. 314 (1969); Barber v Page, 390 U.S. 719 (1968).

Thus, the question is reduced to one of Conn's availability and privilege. We submit that:

> (1) He could not be considered unavailable insofar as defendants were concerned by reason of any arrangement he may have had with the government. Barber, supra;
>
> (2) He could not be considered unavailable by reason of an intention to claim privilege where the purpose of calling him was to testify as to the facts of this case since he had pleaded guilty; and
>
> (3) any possible claim of privilege could not be ruled on only with respect to specific questions after he had been put on the witness stand. United States v Stephens, supra.

Nor should the fact that Conn was awaiting sentence affect his availability. Indeed, to use this fact as a basis of excusing Conn as a

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[2] An analysis of the co-conspirator exception in light of California v Green, 339 U.S. 149 (1970) and Dutton v Evans, 400 U.S. 74 (1970) suggests the hearsay should not be admitted unless the declarant is "unavailable". Davenport, The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A functional Analysis, 85 Harv L Rev. 1378, 1403-4 (1972).

witness, when the existence of the fact was within the control of the very Court which had the duty both to pass sentence on Conn and preside at the trial of the defendants, is plainly error. The Court had a choice between sentencing Conn and thereby giving Arnott a right to confront, on the one hand, and depriving him of the right on the other. It is submitted that Arnott's rights under these circumstances clearly outweighed any possible reason the Court had not to pass sentence.

On this issue, in the present case, the Court of Appeals found that the trial court erred in adjudging that Conn could refuse to answer all questions and stated that Arnott had the right to confront Conn and elecit all non-privileged testimony (Appendix A, page 10).

However, the Court went on to state that "no 'fundamental rights were affected by the Court's ruling'", that "Arnott's defense of entrapment was specious"; and that "the hearsay statements of Conn were few and cumulative to the overwhelming evidence against Arnott."

Petitioner hopes that this Court sees, as he does, the circularness of the Court of Appeal's logic here. Petitioner, in his appeal below, emphasized that but for the error by the trial court in allowing Conn a blanket assertion of the Fifth Amendment privilege, Arnott might have been able to show the entrapment he claimed. Without Conn, Arnott's testimony was the only evidence in favor of his entrapment defense which was admittedly less than a drop in the bucket compared to the parade of government witness who certainly weren't supporting Arnott's best interest.

Petitioner agrees that there was overwhelming evidence against him and that is precisely his point. Petitioner desperately needed some corrobarating evidence in his favor which could have come from the testimony of Conn (which the Court of Appeals said was erroneously withheld). What petitioner did not need but what he got, was a denial of his due process right to have Conn on the stand so long as there was the slightest possibility that Conn's testimony might have corroborated the entrapment.

Further, petitioner finds it puzzling and most distruhing how the Court of Appeals can find as a matter of fact that his defense of entrapment was specious when it is the thrust of his claim that because of the deprival of Conn's testimony his entrapment defense does appear specious. Such further circular logic plays havoc upon petitioner's constitutional rights.

Finally, the speculation in which the Court of Appeals engages is repugnant to the expression by this Court in Dennis, supra.

Upon the Court's granting of Conn's assertion of the Fifth Amendment privilege, counsel for Arnott requested to have Conn physically present to assert the privilege in the presence of the jury. This request was denied.

In United States v Dingle, 546 f.2d 1378 (1976); and Namet v United States, 373 U.S. 179 (1963), which are similar to each other, the Courts allowed the government to call certain witnesses expressly to assert the Fifth Amendment privilege in the presence of the jury- the very procedure that counsel for Arnott

requested. In Namet, supra, the petitioner was convicted by a jury of violating federal wagering tax law. He contended that his conviction should have been reversed because at his trial, the prosecutor was permitted to ask two witnesses incriminating questions concerning their relationship with Namet, with the knowledge that the witness would invoke their privilege against self incrimination.

In affirming the lower courts, the Supreme Court said:

> It is true, of course, that [it was] announced that the Kahns [witnesses who pled guilty to the same charges] would invoke their testimonial privilege if questioned. But certainly the prosecutor need not accept at face value every asserted claim of privilege, no matter how frivolous. In this case the prosecutor initially did not believe that the Kahns could properly invoke their privilege against self incrimination, reasoning with some justification that their plea of guilty to the gambling charge would erase any testimonial privilege as to that conduct. His view of the law was supported by substantial authority, of Reina v United States, 364 U.S. 507, 513 . . . although it was later ruled that the guilty plea did not render all of the Kahn's conduct immune from further prosecution, thus making testimony as to that conduct privileged, there remained a quite proper reason to call the Kahns as witnesses. Both Mr. and Mrs. Kahn possessed non privileged information that could be used to corroborate

> the government's case. They could, and did testify that they knew the petitioner, that he did frequently visit their variety store, and that they themselves had engaged in accepting wages. The government had a right to put this evidence before the jury."

We assert that where it has been held in Dingle, and Namet, supra, not to be reversable error to allow the government to call witnesses knowing of their claim of privilege and over objection from a defendant, that the Court in the case at bar should not have refused counsel's request that Conn at least be made to appear and assert the privilege in the presence of the jury. Moreover, we contend that it was reversable error to deprive Arnott of this right to confront Conn since he "possessed non privileged information that could be used to corroborate [Arnott's] case." Namet, supra.

In Dennis v United States, 384 U.S. 855, 873 (1966), this Court said:

> A conspiracy case carries with it the inevitable risk of wrongful attribution of responsibility to one or more of the multiple defendants. Under these circumstances, it is especially important that the defense, the judge and the jury should have the assurance that the doors that may lead to truth have been unlocked. In our adversary system for determining guilt or innocence, it is

> rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations.

While in his capacity as government informant and agent, Joseph Fronteira solicited and entrapped Arnott and others while working out a government scheme to apprehend Conn, who had been previously convicted for dealing in drugs.

From late fall, 1980, until mid-winter, 1981, Fronteira continuously solicited and tempted Arnott with offers and "schemes" to "get-rich-quick" all of which were illegal. Fronteira offered him a job "dealing Black Jack" "doing armed robbery" and "selling drugs" all of these ideas being created in the mind of Fronteira, a government agent.

Prior to Arnott's arrest, Fronteira seemed to conveniently fade out of the picture, being replaced by Sargent Bertee, along with others, who then find Arnott appearing as a seasoned and professional drug dealer.

Conveniently again, Fronteira was arrested on drug charges himself, just prior to Arnott's

trial. The government, of course did not attempt to call Fronteira as a witness, and even objected to his name being mentioned to the jury. Instead the government used as its key witness, Sargent Bertee, who's testimony naturally depicted Arnott as a full-fledged criminal, but showed nothing of Fronteira's entrapping method. In an effort to unlock the truth surrounding the circumstances of Arnott's enticement to enter the criminal camp of Conn, Fronteira and others, counsel for Arnott arranged to call Fronteira as a witness. Counsel also arranged to call Gerald Naylor who would impeach Sarget Bertee. We submit that Fronteira's testimony, if allowed, would have corroborated Arnott's claim of entrapment.

The following colloquy took place out of the presence of the jury:

> MR. MOON: Your Honor, as the Court file will reflect and as the Court will recall, there is a writ for Dennis Gerald Naylor, N-a-y-l-o-r, Gerald with a G and a writ for a Joseph Fonteira [sic]. They are both present in the U.S. Marshall's lockup. And I have interviewed both of them this morning about the scope of questions that I wish to put to them, as far as the defense of Paul Arnott. They both relate to me that if the scope of questions were limited to my questions,

they would have no difficulty in answering them. However, they fear, as each of their counsel fears, that if cross-examination were allowed on other matters, that it could incriminate them under the Fifth Amendment.

And so I, like Mr. Kesten, am asking for a preliminary ruling by the Court in accordance with Rule 611 under Procedure and Order of Interrogation or Presentation

* * *

Also I would like to make -- I will now make a statement of questions that I would present to each witness.

THE COURT: Wait a minute. Wait a minute. I don't understand. What part of -- is there any waiver play any part in this? Once they answer a question on certain subjects, there's plenty of law they have waived the right to assert the privilege. Doesn't make any difference whether it was cross or not cross.

MR. MOON: That's true. However, the questions as I have composed them do not couch on the issues that present incriminatory matters as to them. Only as to their personal knoweldge of the activity at a particular point in time as it pertains to Defendant Arnott.

THE COURT: I know. But that may constitute a waiver, and I can't tell anything ahead of time as to whether or not it is indeed a waiver because I do not know what the Government's cross-examination would be, and I do not know anything about the details that have not been revealed about this case or any related matters that have not been revealed to me in the course of this trial. So you can tell me all kinds of questions that you want to

ask and they don't mind answering it, but I can't tell you that they have not waived it until I hear the question and until I know what the context is. So you can say it all you want, but I am not going to give you a ruling ahead of time on that subject because it is not possible for me to do so.

MR. MOON: Is the Court in effect saying that you are not in a position to rule on the question of law, waiver as to that particular witness because they are not before the Court?

THE COURT: It is not a question of whether they are before the Court. It is a question of I don't know what the examination and cross-examination will be. I do not know their relationship to the charges, and I also don't know what question and what answer leads to something else which may constitute a waiver of the privilege. The privilege is not determined solely upon what appears on the record here.

I'll give you a quick example. Say on January 12, 1981, he was with so-and-so. They may have a record, Government may have a record of a surveillance of Mr. F that shows he was someplace else. How would I know whether that's a waiver or not?

MR. MOON: So, in effect, the Court is saying thanks for it would not be possible to place the Court in a position to rule over waiver unless, in effect, the client-not client, but the witness testified with temporary immunity, if you will?

THE COURT: One of the unfortunate parts of the Fifth Amendment is that the question of waiver is not ruled upon until a subsequently -- usually a subsequent proceeding where somebody comes along or a subsequent event. A Cross-examination is

> subsequent to the direct-examination. Whether or not they waive that right can only be determined later. But certainly when technical doctrine, and it's something that I can't rule on in advance, there is no way.
>
> In order for me to be able to say to him, to a witness, "If you answer that questions, Mr. Witness, you have not waived the right to assert the Fifth Amendment," I have to know everything in the world about that man, and I can't know that. (Emphasis added).

The Court stated that in order for it to rule on the question of waiver of the privilege against self incrimination it would have to know the cross-examination, that it could not determine this merely by hearing the question asked on direct. This is, however, contrary to case law. In United States v Stephens, 492 F.2d 1367, 1374 (6th Cir. 1974), the Court said regarding this very point, that "[the witness] should have been required to take the witness stand and assert the privilege in response to particular questions . . . Then if [the witness] refused to answer . . . the Court had the responsibility to determine whether an answer could be required."

Moreover, the Court, in the present case, refused to even hear the question out of the

jury's presence. We contend that where it has been ruled, as in Stephens, supra, that the Court can make a question by question determination concerning a witness' privilege against self incrimination while on the stand and before a jury, that the Court's refusal to even hear the prepared questions violated Arnott's constitutional right to even minimal confrontation under the 6th Amendment and his right to Due Process under the 5th Amendment fundamental fairness doctrine.

Since it was Fronteira who committed the entrapment giving rise to Arnott's only defense, the Court erred in depriving him any opportunity to confront Fronteira and uncover the truth. In a conspiracy case it is especially important that the defense, the judge, and the jury should have the assurance that the doors that may lead to the truth have been unlocked, Dennis, supra. Fronteira helped set up the criminal occurance and played a prominent part in it although his prominence seems to fade upon Sargent Bertee's entrance into the lime light. It is of slight consolation, therefore, that

it can be said that any right to confrontation was provided through the cross-examination of Sargent Bertee and other government witnesses who entered the scene subsequently to Fronteira's early role in the matter. In Rovario v United States, 353, U.S. 53, 63, 64, (1957), like the case at bar, the testimony of the government's informant was vital to the appellant's claim of entrapment but was not allowed at trial. In reversing the trial court, this Court said:

> The circumstances of this case demonstrate that [the informants] possible testimony was highly relevant and might have been helpful to the defense. So far as petitioner knew, he and [the informant] were alone and unobserved during the crucial occurrence for which he was indicted. Unless petitioner waived his constitutional right not to take the stand in his own defense, the informant was his one material witness. Petitioner's opportunity to cross-examine Police Office Bryson and Federal Narcotics Agent Durham was hardly a substitute for an opportunity to examine the man who had been nearest to him and took part in the transaction.[The informant] had helped set up the criminal occurrence and had played a prominent part in it. His testimony might have disclosed an entrapment.

We submit that but for the efforts of Fronteira there would have been no "criminal occurrence" regarding Arnott and that his

testimony was "highly relevant" and "might have disclosed the entrapment".

It therefore was the duty of the court and the government, under these circumstances, (that is, where conspiracy is charged) to dismantle the procedural obstacles and facilitate the production of Fronteira's testimony. In Sherman v United States, 356, U.S. 369 (1958), this Court said:

> The courts refuse to convict an entrapped defendant, not because his conduct falls outside the prescription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the Government to bring about conviction cannot be countenanced. As Mr. Justice Holmes said in Olmstead v United States, 277 U.S. 438 . . . 'It is desirable that criminals should be detected, and to that end all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. . .[F]or my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part'. Insofar as they are used as instrumentalities in the administration of criminal justice, the federal courts have an obligation to set their face against enforcement of the law by lawless means or means that violate the rationally vindicated standards of justice and to refuse to sustain such methods by effectuating them.

Few rights are more fundamental than that of an accused to present witnesses in his own defense. Chambers v Mississippi, 410 U.S. 284, 302 (1973). And knowing suppression by the prosecution of exhonerating evidence renders a conviction constitutionally infirm. Brady v Maryland, 373 U.S. 83 (1963); United States v Young, 426, F.2d 93 (1970).

In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations, Dennis, supra.

We submit that the prosecution without justification did have exclusive access to a storehouse of facts relevant to Arnott's claim of entrapment inasmuch as Fronteira's testimony was prohibited through the Court's inaction and the prosecution's lack of cooperation and that the real impact of Fronteira's influence in the case never attained a minutia of credibility as to the jury. Indeed, Arnott's solitary account of the entrapment was most certainly

overshadowed by the testimony of the several government witnesses who barely acknowledged the existence of the informant Fronteira, let alone the nature of his role. Under such circumstances, there could be no substitute for Fronteira's own testimony which he would have given voluntarily.

In United States v Head, 353 F.2d 566 (1965), where the defendant was denied access to the testimony of the government's informant, the Court, in affirming the conviction said: "The prosecution did not rely on [the informant] in any way to establish the commission of the offense by the defendant. The only part which [he] played in the affair was to introduce Dixon to the defendant". In the present case, we point out that the prosecution indeed did not need to "rely" on the informant, Fronteira, to make out its case against Arnott. That, we assert, is the very issue of this petition. Fronteira had done his job well. When he in effect handed over the case to Sargent Bertee and his team, the entrapment was completed.

What remained was simply a matter within the capability and expertise of the law enforcement officials without further assistance from an informant - although it is not implied that Fronteira's continued assistance in the case was not received. It is not then a question of the prosecution needing the informant to establish the commission of the offense, but rather the defendant, Arnott, needing the informant to establish the entrapment. Moreover, Fronteira did much more than merely "introduce" Bertee to Arnott. We assert that he actually entraped Arnott. That is, that the criminal conduct was the product of the creative activity of government informant and agent, Fronteira. Sherman, supra.

In United States v Barnett, 418, F.2d 309, (6th Cir. 1969), where the trial court and the prosecution effectively deprived the defendant of the government informant's testimony, in its opinion reversing the trial court, the Court said: ". . . it is significant that the informer did not merely provide a 'tip' for the government, but he was present and

participated with the government agent throughout the alleged sale". Again, Fronteira did provide more than a "tip", in fact he provided the illegal narcotics which Sargent Bertee contrived to purchase from Arnott.

In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effective be made only by an advocate. Dennis, supra.

It is esepcially important in conspiracy cases that all information which may lead to the truth be made available, Stephens, supra. It being Arnott's assertion that the entrapment occurred not only through Bertee, but also through Fronteira, it was plainly error for the Court to hamstring the defense from calling Fronteira to the stand.

The Court of Appeals in the present case, claims that counsel for Arnott deprived the trial court of an opportunity to consider the validity of any asserted claim of privilege by Fronteira since he declined to ask Fronteira any questions upon the Court's invitation.

(Appendix A pp 3 & 4). However, petitioner contends that the Court's invitation was absolutely hollow and meaningless where as it was pointed out to the court, that according to prior agreement between Arnott's counsel and Fronteira and his counsel, that Fronteira would testify only if the court would agree to prevent the prosecution from unbounded cross-examination. Counsel for Arnott was not asking the court to allow unchallenged testimony. On the contrary, the government would have been free to challenge the subject matter of the direct examination and the credibility of the witness. The ruling was requested merely to prevent a fishing expedition by the government into "other matters" which Fronteira feared would occur without the ruling.

Also, a point of confusion created by the trial judge and broadened by the Court of Appeals is the implication that instead of merely seeking the limitation of cross-examination, Fronteira requested "full immunity". This is not so (See Appendix A page 3). While questioning Fronteira, the trial judge used

those words with which Fronteira being a layman in the area of legal terminology, merely agreed.

Petitioner contends that the court's invitation to question Fronteira was not meaningful because of the chilling effect of its refusal to limit the cross-examination as requested. Such a request was not unreasonable considering all the circumstances not of the least of which was the fact that a conspiracy was charged and the attendant dangers associated therewith as pointed out in Dennis, supra.

Finally, in a further effort to obtain "what may be useful", indeed, vital to Arnott's defense, counsel again pointed out to the Court the need to obtain Fronteira's testimony, as can be seen in the colloquy that follows:

> THE COURT: Is there any need, indeed, is there any basis for making Mr. Fronteira assert the privilege in the presence of the jury? I don't believe that there is.
>
> MR. MOON: Your Honor, since Mr. Fronteira has been mentioned before the jury, I would like to ask him his name and have him answer me, and I would like to ask him if he is acquainted with Paul Arnott and at that time, I would like on the record that he takes the Fifth Amendment and he be excused from the room.

THE COURT: Request denied.

Concerning the position that Fronteira should have been called to the stand even if only to assert his Fifth Amendment privilege in the presence of the jury, the Court of Appeals held that this was not error. However, the Sixth Circuit has held otherwise where it is the prosecution who is seeking this procedure. United States v. Compton, 365 F.2d 1 (6th Cir. 1966); United States v. Kilpatrick, 477 F.2d 357 (6th Cir. 1973); United States v. Maffei, 450 F.2d 928 (6th Cir. 1971); United States v. Vandetti, 623 F. 2d 1144 (6th Cir. 1980). In each of these cases it is the defendant who claims error by the court for permitting the prosecution to call a witness when it is known that the witness will claim the privilege against self incrimination. It appears that in the Sixth Circuit, what is good for the goose is not good for the gander.

In United States v. Vandetti, supra, the Court stated that although "the judge must determine whether the probative value of the proffered evidence is substantially outweighed

by the danger of unfair prejudice" . . . "This court has permitted the practice of calling a witness who will assert his Fifth Amendment privilege where 'the prosecutor's case would be seriously prejudiced by a failure to offer him as a witness'." (Emphasis added). We argue that where conspiracy has been charged and the witness might be helpful in disclosing an entrapment, the defendant's case was seriously prejudiced by a failure to call a witness. See United States v. Dennis, supra, and Rovario v. United States, 353 U.S. 53 (1957).

Such a distinction by the Sixth Circuit between the prosecution and the defendant violates due process. Petitioner therefore invites this Court to settle such unequality.

A deciding factor in choosing a defense of entrapment for Arnott was a ruling by the Court prior to trial to allow the presentation of hearsay testimony which included taped telephone conversations[3] without a prior showing by a preponderance of the evidence that a conspiracy existed. Indeed, in order to represent Arnott competently, counsel for Arnott was duty

bound to present the best defense in light of the ruling of the court. Therefore, it is applicable to Arnott that we concur with the argument made in the brief filed on behalf of co-defendant Sandra Hancock in the Court of Appeals below and restate that argument as set forth below:

The prevailing law in the Sixth Circuit is United States v Vinson, 606 F.2d 149 (6th Cir. 1979) in which it was decided that the District Judge may consider the hearsay statements themselves of co-conspirators to determine if those statements are admissable. Petitioner asks this Court to address this issue and resolve the split of authority within the Court of Appeals and change the ruling in this circuit and others to conform to the majority of circuits which require that the existence of a conspiracy should be determined upon only non-hearsay evidence prior to the consideration of any hearsay evidence.

The ruling in Vinson, following the Courts ruling in United States v Enright, 579 F.2d 890

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[3]Counsel for Arnott had a continuing objection to this evidence being admitted.

(6th Cir. 1978) whereby the Sixth Circuit determined that before the Government can admit into evidence the hearsay statements of a co-conspirator, under Fed. R. Evid. 104 (a)[4], they must show by a preponderance of the evidence that the conspiracy existed, that the defendant against whom the hearsay is offered was a member of the conspiracy, and the statement was made in the course and in furtherance of the conspiracy. The preponderance of evidence standard was a change from the test of "prima facia case" that was the rule before the new Federal Rules of Evidence. In footnote 4 of the Enright decision at page 985 the Court said that Rule 104 (a), "arguably permits the trial court to consider the very statement seeking admission in making its determination."

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[4]Rule 104. Preliminary Questions. (a) Questions of admissability generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the Court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

The Vinson Court at page 153 took the issue a step further and held that Rule 104 (a) did in fact allow the trial Court to consider statements. In that decision at footnote 9, page 153, the Court acknowledged there was a split of authority on the issue.

The First Circuit, at that time, allowed the trial Court to consider the hearsay statements People v Martorano, 557 F 2d 1, 12 (1st Cir. 1977). The Fifth and Eighth Circuits followed the rule that even though Rule 104 (a) changed the standard of proof to a "preponderance of the evidence" to admit the hearsay statements of co-conspirators, they required that the standard must be met by independent evidence exclusive of the hearsay statements themselves. United States v James, 576 F.2d 1121, 1131, (5th Cir. 1978), and United States v Bell, 573 F.2d 1040, 1044 (8th Cir. 1978).

Presently, a survey of the circuits reveals that a majority of the circuits require the proof by a preponderance of independent evidence. United States v Jackson, 627 F.2d 1198 (D.C. Cir. 1980); United States v Nardi,

633 F.2d 972, 974 (1st Cir. 1980); United States v Alvarez-Porras, 643 F.2d 53, 57, (2nd Cir 1981); Government of Virgin Ilsand v Dowling, 633 F.2d 660, 665 (3rd Cir. 1980); United States v Gresko, 632 F.2d 1128, 1131 (4th Cir. 1980); United States v James, supra; United States v Bell, supra; United States v Andres, 585 F.2d 961, 966 (10th Cir. 1978). The Nineth Circuit also requires proof by independent evidence but they still use the standard of prima facia evidence instead of preponderance of evidence. United States v Miranda-Uriarte, 1345, 1349 (9th Cir. 1981). The Seventh Circuit has alluded to the issue but has not reached it in United States v Santiago, 582 F.2d 1128, 1133, n.11 (7th Cir. 1978).

In the aforementioned citations, it should be noted that even the First Circuit, which was the first to allow the Court to consider the hearsay statements in People v Martorano, supra, changed it's position in the later case of United States v Nardi, supra, where the Court stated at page 974:

> "Under that exception, hearsay testimony of statements made by a co-conspirator during and in furtherance of the conspiracy in which the defendant participated is established by a preponderance of independent non-hearsay evidence." [Emphasis added]

The opinions that do not allow the Court to consider the hearsay statements indicate that it was the tranditional rule and it is too important a safeguard to throw aside, citing Glasser v United States, 315 U.S. 60 74-75, 62 S.Ct 457, 86 L.Ed. 680 (1942). Even the First Circuit's case of People v Martorano, supra, cited Glasser for the proposition that the hearsay testimony should be given little weight.

In Vinson, supra, on page 152, the Court presents three alternative methods for District Judges to structure conspiracy trials regarding the time at which any hearsay evidence may be admitted, if at all, vis-a-vis proof that a conspiracy exists based on non-hearsay evidence: One, the Court may conduct a "mini-hearing" in which, it, without a jury, hears the government's proof of a conspiracy and makes the preliminary Enright finding; Two, the hearsay may

not be admitted until after the government has established the conspiracy by a preponderance of the evidence at the trial; or Three, the hearsay evidence is admitted at trial subject to a later demonstration of its admissibility by a preponderance of the evidence. In discussing each of the three methods presented in Vinson, the Court itself points out the criticism to the so-called "mini-hearing", that is, it is burdensome, time-consuming, and uneconomic, and also points out the danger of a mistrial where the hearsay is admitted subject to a later showing of its admissibility. However, as to the method whereby the government must prove a conspiracy by non hearsay evidence prior to admitting any hearsay, the Court points out no criticism or caveat. In fact, on page 153, the opinion restates the three methods sequentially different than on page 152 which suggests an order of preference. In this sequence, the latter mentioned alternative is first or (a), and the second mentioned alternative, which the Court chose in the case at bar, is last

or (c). We suggest that in light of the problems associated with alternatives (b) and (c) which the Court itself points out, that alternative (a) is the one fair and efficient method and should be the exclusive procedure in this and all jurisdictions. Indeed, where is the need at all for methods that are costly and burdensome to the courts, and increase the likelihood of a mistrial. Citing United States v Macklin, 573 F.2d 1046, 1049 N. 3 (8th Cir), cert denied 439 U.S. 852 (1970), regarding alternative (a), the Vinson opinion says "This procedure clearly avoids 'the danger . . . of injecting the record with inadmissable hearsay in anticipation of proof of a conspiracy which never materializes.'"

The hearsay statements of the alleged co-conspirators should not be considered in determining if the government met its burden of proving by a preponderance of the evidence that Arnott was part of a conspiracy, per the Enright case. Although that position would be contrary to the Sixth Circuit's previous ruling in the Vinson case and the present case,

it would be consistent with the majority of the circuits and give credence to an important and tranditional safeguard.

The admission into evidence of the several guns during the course of the trial was error in that they were irrelevant, Fed. R. Evid. 401, and prejudicial, Fed. R. Evid. 403, and violated petitioner's right to due process.

Prior cases in the Court of Appeals involving issues similar to this one have held guns to be admissible. United States v Marino, 658 F.2d 1120 (6th Cir. 1981); United States v Korman, 614 F.2d 541 (6th Cir. 1980); and United States v Wiener, 534 F.2d 15 (2nd Cir. 1976), all of which, however, when compared to the case at bar, are distinguishable on their facts.

At trial, the relevant facts concerning the present case were pointed out to the Court by counsel for Arnott:

> MR. MOON: And I would argue that and make a motion to exclude them [the guns] entirely from the trial because there is no evidence that my client resides permanently at the premises. There is no evidence that guns were involved in any way in the alleged conspiracy. The testimony has been that Paul Arnott was not armed at the time that he was arrested.

> And I would further make a motion that it is not logical to -- for myself as counsel to believe that these guns are any part of the conspiracy because in none of the materials that we have been provided by way of discovery does it indicate that there were any guns taken in payment, that there were any guns used in this conspiracy in any way. And that they therefore should be entirely excluded in the trial.

In Marino, supra, the Court rejected the appellant's contention that the admissibility of certain guns seized was error. But in Marino, unlike the case at bar, the guns seized were in the immediate possession of the defendants as described in the Court's opinion as follows: "DEA agents apprehended Marino, Orlando and Williams as they attempted to leave Peltin's home in a truck loaded with the furniture containing cocaine. The officers seized Marino's briefcase which contained a .25 caliber semi-automatic Colt pistol. They also found maps, airline tickets, customs receipts, Peruvian bank documents and hotel receipts in the defendants' possession. A search of the truck revealed not only cocaine valued at $3.7 million, but Orlando's suitcase which contained a shotgun, a loaded revolver, a derringer, and

ammunition."

The Marino Opinion goes on to cite United States v Korman, supra, where the Court stated that "dealers in narcotics are well known to be dangerous criminals usually carrying weapons." (Emphasis added).

Again, Arnott was no where even in the vicinity of a gun when arrested, in fact no weapons at all were found in the car driver to the motel where he was arrested. Indeed, there was no allegation or testimony that he ever owned or possessed a gun at any time during the alleged conspiracy.

In United States v Wiener, supra, which was cited by the government in the case at bar, and upheld and thereby expanded by the Court of Appeals below, the appellant claimed that the court abused its discretion in admitting in evidence a loaded pistol which was "found in his apartment at the time of the search on the date of his arrest." (Emphasis added).

In its opinion affirming the conviction and upholding the admission of the psitol not

to be prejudicial, the Court said: "Experience . . . has taught that substantial dealers in narcotics keep fire arms on their premises as tools of the trade . . ." (Emphasis added). The premises where the guns were seized was not Arnott's premises, it was Conn's.

In attempting to show this very fact, counsel for Arnott interrogated agent Gary Wade of which the Court questioned the relevance. The following colloquy between the Court and counsel for Arnott then took place:

> MR. MOON: The relevance, your Honor, I will be endeavoring to establish that my client didn't live there.
>
> THE COURT: Everybody knows he didn't live there. That's not something that has been a secret in this trial.

The three cases cited by the government Marino, Korman and Wiener, each deals with fact where the individual either is carrying a weapon, owns or possesses a weapon, or keeps a weapon on his premises. Neither of these conditions pertains to Arnott and we submit that because of this significant distinction the Court violated petitioner's right to due process in allowing the admission of any guns

based on the inapplicable case law cited by the government.

In Count Nine of the Indictment numerous guns are listed, including all those presented at trial. Count Nine charges only Conn as a felon in possession and nowhere in the Indictment is Arnott similarly charged since he too had been convicted of a prior felony. The government, therefore, by its own admission demonstrated the inapplicability of such evidence to Arnott and should not have been allowed to introduce evidence which properly belonged only in the trial of another.

A conspiracy case inherently carries with it the inevitable risk of wrongful attribution of responsibility to one or more of the multiple defendants. Dennis v United States, 384, U.S. 855, 985, (1966). Based upon this fact in addition to the several claimed errors Arnott faced at trial, it was unduly burdensome and prejudical to saddle his defense with this additional irrelevant and inflammatory evidence.

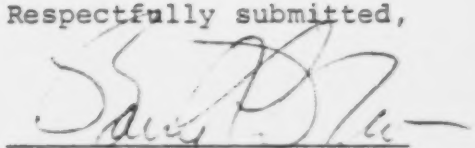
We submit that the trial court has a duty

to prohibit the admission of evidence where as in the case at bar, there is even the slightest appearance that it will be more prejudicial than probatively significant.

CONCLUSION

Petitioner believes that this case involves timely and substantial questions of great public importance and further, that the decision of the United States Court of Appeals for the Sixth Circuit and the United States District Court for the Eastern District of Michigan, Southern Division, should be reversed for the reasons already stated herein.

Respectfully submitted,



Barry L. Moon
Attorney for Petitioner
BARRY L. MOON, P.C.
14292 Fenton Road
Fenton, Michigan 48430
Telephone: 313-629-8801

APPENDIX

NO. 82-1090

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	On Appeal from the United States District Court for the Eastern District of Michigan.
v	
PAUL ARNOTT, Defendant-Appellant.	

Decided and Filed April 8, 1983

Before: KEITH and KRUPANSKY, Circuit Judges; and PHILLIPS, Senior Circuit Judge.

KRUPANSKY, Circuit Judge. Paul Arnott (Arnott) directly appeals the judgment of the United States District Court for the Eastern District of Michigan entered in accordance with a jury conviction on the indicted charges of conspiracy to possess with intent to distribute and to distibute

cocaine and conspiracy to manufacture phencyclidine, both in violation of 21 U.S.C. §§ 841 (a) (1) and 846, distribution and aiding and abetting in the distribution of cocaine, in violation of 18 U.S.C. § 2 (a) and 21 U.S.C. § 841 (a) (1), and use of a communication facility to facilicate the distribution of cocaine, in violation of 21 U.S.C. § 843 (b).

At trial Arnott testified in his own behalf and advanced a defense of entrapment. It was represented to the district court that Joseph Frontiera (Frontiera) would be offered as a defense witness to corroborate Arnott's defense of entrapment. Frontiera had been indicted on charges unrelated to those of Arnott's trial. Arnott moved for a preliminary ruling by the court under Rule 611, Federal Rules of Evidence, to limit the scope of cross-examination

of Frontiera by the prosecution to the subject matter of direct-examination. It was theorized that Frontiera would be able to respond to various questions on direct-examination concerning the issue of entrapment without incriminating himself but that cross-examination could lead to incriminating testimony if not limited by the court. During a voir dire examination, Frontiera indicated that he would invoke the fifth amendment and refuse to answer any potentially incriminating questions unless "given full immunity by the court." Arnott's counsel thereupon declined the court's invitation to elicit from Frontiera the explicit questions which would be posed on direct-examination. This refusal of defense counsel deprived the court of an opportunity to consider the validity of any asserted claim of privilege by Frontiera.

Rather, Arnott's counsel simply reiterated the position that, with limited cross-examination, neither direct nor cross-examination would infringe upon Frontiera's fifth amendment guarantees:

> THE COURT: Questions, Mr. Moon.
>
> MR. MOON (Arnott's counsel): Only the statement, your Honor, as I understand my conversation with Mr. Frontiera, the kind of questions I would ask him based upon the Court's discretion to allow cross-examination and its relevance, I don't have any questions of Mr. Frontiera that would be outside the scope of which he is concerned.

On appeal, Arnott submits that the district court's failure to exercise Rule 611, Fed. R. Evid., discretion to limit cross-examination

of Frontiera to the subject matter of direct-examination and matters affecting the credibility of the witness served to preclude Frontiera from testifying in Arnott's behalf and thereby effectively deprived Arnott of his sixth amendment right to confront and examine Frontiera. Rule 611 (b) provides:

> (b) Scope of Cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

The subject matter of direct examination

and issues of witness credibility are always open to cross-examination. United States v Raper, 676 F.2d 841 (D.C. Cir. 1982). Cross-examination into collateral and other matters "as if on direct" are addressed to the court's discretion. Raper, supra; United States v. Stephens, 492 F.2d 1367 (6th Cir.), cert. denied, 419 U.S. 852 (1974). The "subject matter of the direct examination," within the meaning of Rule 611 (b), has been liberally construed to include all inferences and implications arising from such testimony:

> The implications of the proffered testimony were very broad and any question which would have elicited testimony that was reasonably related to the inferences that might reasonably be drawn from his direct testimony would have been permissible.

Raper, supra, 868 F.2d at 846. In the action sub judice, as in Raper, the "implications of the proffered tesimony (would be) very broad." Arnott intended to elicit from Fronteria testimony in support of an entrapment defense. Accordingly, the district court did not abuse its discretion in limiting cross-examination to express questions posed on direct-examination.

More importantly, it is well-established that a district court may not rule on the validity of a witness' invocation of the fifth amendment privilege against compulsory self-incrimination until the witness has asserted the privilege in response to a particular question. United States v Stephens, 492 F.2d 1367 (6th Cir.), cert. denied, 419 U.S. 852 (1974); United States v. Harmon, 339 F.2d 354, 359 (6th Cir. 1964),

cert. denied, 380 U.S. 944 (1965). Arnott's counsel failed to pose any particular questions to Frontiera, and therefore the district court was not confronted with any obligation to rule upon an asserted privilege. Arnott's counsel simply represented that the direct questions would not invoke Frontiera's fifth amendment privilege. Assuming this to be true, then the privilege, if asserted at all, would be in response to a question on cross-examination. Such cross-examination never materialized, and therefore Frontiera was never called upon nor did he assert his privilege in response to a particular question.

Further, the district court did not err in denying Arnott's request that Frontiera be required to assert the privilege against self-incrimination in the jury's presence, United States v. Johnson, 488 F.2d 1206

(1st Cir. 1973); United States v. Beye, 445 F.2d 1037 (9th Cir. 1971); Bowles v. United States, 439 F.2d 536 (1970) (en banc), cert. denied, 401 U.S. 995 (1971).

Arnott secondly charges violation of a sixth amendment right to confront and cross-examine Ronald Conn (Conn), an indicted co-conspirator. Conn's hearsay statements incriminating Arnott were admitted under Rule 801 (d) (2) (E), the co-conspirator exception to the hearsay rule, through the testimony of Sargent Robert Bertee (Bertee), an undercover police officer. Arnott subpoenaed Conn and the latter, physically unable to attend trial, vicariously asserted a fifth amendment privilege against compulsory self-incrimination through his counsel. Conn had pled "guilty"

to those charges contained in the indictment. This plea constituted a waiver of any fifth amendment right against self-incrimination as it applied to "that crime," but did not constitute a blanket waiver of the fifth amendment privlege. United States v Seavers, 472 F.2d 607, 309 (6th Cir. 1973). The district court adjudged that Conn had not waived a fifth amendment privilege against self-incrimination on charges predicated upon income tax violations. The court erred in adjudging that Conn could refuse to answer all questions as predicated upon some abstract possibility that Conn may be exposed to a tax prosecution. Arnott had the right to confront Conn and elicit all non-privileged testimony. See: United States v Stephens, 492 F.2d 1367 (6th Cir.), cert. denied, 419 U.S.

852 (1974). As aforenoted, whether such testimony would be privileged could not be ascertained until particular questions were posed and the privilege asserted. Stephens, supra.

This Court adjudges, however, that no "fundamental rights were affected by the court's ruling." Stephens, supra, 492 F.2d at 1374. Arnott's defense of entrapment was specious; the criminal offenses upon which Arnott was indicted transpired months after Arnott's last exposure to Frontiera. Further, the hearsay statements of Conn, admitted through Bertee's testimony, were few and cumulative to the overwhelming evidence against Arnott.

Arnott thirdly submits that the district court abused its discretion in considering the hearsay statements of co-conspirators

to determine the existence of a conspriacy as mandated by United States v. Enright, 579 F.2d 980 (6th Cir. 1978) under Rule 801 (d) (2) (E). This Court reaffirms its pronouncements in United States v. Vinson, 606 F.2d 149 (6th Cir. 1979), cert. denied, 444 U.S. 1074 (1980); United States v. Cassity, 631 F.2d 461, 464 (6th Cir. 1980); Snyder Co., Inc. v. Associated General Contractors, 677 F.2d 1111, 1117 (6th Cir. 1982) and finds no merit in petitioner's third assignment of error.

Fourth, Arnott advances that the district court abused its discretion when it permitted as evidence certain weapons which had been confiscated from Ronald Conn's residence. Rules 401, 403, Fed. R. Evid. No weapons were seized from Arnott's person or automobile upon arrest at a motel. In United

States v. Marino, 648 F.2d 1120 (6th Cir. 1981) this Court affirmed the district court's introduction of weapons into evidence even though the indicted charges did not include firearm offenses. It was recognized that weapons are "tools of the trade" in trafficking of narcotics. Since Arnott was indicted upon the charge of distributing cocaine, and since Arnott frequently visited Conn's residence where the illegal contraband was stored in Conn's "secret room," it may be inferred that such weapons were tools of the trade used by both Conn and other co-conspirators to protect their narcotics enterprise. The district court did not abuse its discretion in admitting the weapons.

Last, Arnott charges that the district court abused its discretion by permitting

the government to question witnesses in a leading manner. However, only two objections were tendered and Arnott failed to demonstrate any prejudice.

The judgment of the district court is AFFIRMED.

NO. 82-1090

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED

JUL 19 1983

JOHN P. HEHMAN, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

PAUL ARNOTT,

Defendant-Appellant

O R D E R

BEFORE: KEITH and KRUPANSKY, Circuit Judges; and PHILLIPS, Senior Circuit Judge

The following language which appears on page 3 of the opinion heretofore decided and filed on April 8, 1983, which states:

> Accordingly, the district court did not abuse its discretion in limiting cross-examination to any express questions posed on direct-examination.

is hereby deleted and replaced with the following:

> Accordingly, the district court did not abuse its discretion in refusing to limit cross-examination to any express questions posed on direct-examination.

ENTERED BY ORDER OF THE COURT

John P. Hehman/cs
Clerk

APPENDIX B

JUDGMENT OF DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff

NO. 81-50055-2
(i1-80194-2)

vs

PAUL JAMES ARNOTT

Defendant

* *

JUDGMENT AND PROBATION/COMMITTMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date 1/19/82 with counsel, Barry Moon.

Defendant plead

There being a verdict of guilty.

FINDING AND JUDGMENT

Defendant has been convicted as charged of the offenses of Count I-Conspiracy to Possess w/Intent to Deliver Cocaine, 21:841(a)(1) & 846. Count II-Conspiracy to Manufacture PCP, 21:841 (a)(1) & 8461 Count III-Distribution of Cocaine & Aiding & Abetting, 21:841(a)(1) & 18:2(a). Count IV-Use of Communication Facility to Facili-

tate the Distribution of Cocaine, 21:843.

As to Count I, it is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of eight (8) years and that the defendant shall become eligible for parole under the provisions of Title 18, United States Code, Section 4205(b)(2), at such time as the Parole Commission may determine.

As to Count II, it is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of eight (8) years and that the defendant shall become eligible for parole under the provisions of Title 18, United States Code, Section 2405(b)(2), at such time as the Parole Commission may determine.

As to Count III, it is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of eight (8) years and that the defendant shall

become eligible for parole under the provisions of Title 18, United States Code, Section 4205 (b)(2), at such time as the Parole Commission may determine, to be followed by a Special Parole Term of five (5) years.

As to Count IV, it is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of two (2) years and that the defendant shall become eligible for parole under the provisions of Title 18, United States Code, Section 4205 (b)(2), at such time as the Parole Commission may determine.

The secnteces imposed under Counts II, III, and IV are ordered to be served concurrently with the sentence imposed under Count I. This sentence is to be served concurrently with the defendant's state sentence for parole violation.

Bond is hereby ordered cancelled.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be

imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders committment to the custody of the Attorney General and recommends that the Bureau of Prisons initially designate the defendant to serve his Federal sentence in any state facility as designated by the Michigan Department of Corrections.

Signed by U.S. District Judge /s/
Stewart A. Newblatt

Date 1/19/82

Certified as a true copy
on this date 1/19/82

By: /s/
Deputy

APPENDIX C

TEXT OF CONSTITUTIONAL AND STATUTORY PROVISIONS AND FEDERAL RULES

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

RULE 104 OF THE FEDERAL RULES OF EVIDENCE

Preliminary Questions

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

RULE 401 OF THE FEDERAL RULES OF EVIDENCE

Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probably than it would be without the evidence.

RULE 403 OF THE FEDERAL RULES OF EVIDENCE

Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

No. 82-2028

In the Supreme Court of the United States

OCTOBER TERM, 1983

PAUL ARNOTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
STEPHEN S. TROTT
Assistant Attorney General
GLORIA C. PHARES
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether, in light of the overwhelming evidence of petitioner's guilt and the frivolous nature of his entrapment defense, the district court committed reversible plain error in permitting a witness subpoenaed by the defense to rest upon a blanket claim of Fifth Amendment privilege.

2. Whether the district court erred in refusing to restrict cross-examination of an intended defense witness.

3. Whether there was sufficient evidence of the existence of a conspiracy to permit the admission of out-of-court co-conspirator statements.

4. Whether weapons found in a co-conspirator's residence were properly admitted at trial.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 704 F.2d 322.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1983. The petition for a writ of certiorari was filed on June 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on four counts charging him with conspiracy to distribute and to possess with intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) and 846 (Count 1); conspiracy to manufacture phencyclidine,

in violation of 21 U.S.C. 841(a)(1) and 846 (Count 2); distribution of cocaine, in violation of 21 U.S.C. 841(a)(1) (Count 3); and use of a communications facility to facilitate the distribution of cocaine, in violation of 21 U.S.C. 843(b) (Count 4). He was sentenced to eight-year terms of imprisonment on Counts 1, 2, and 3 and a two-year term on Count 4, all to run concurrently with each other and with petitioner's state sentence for parole violation. In addition, a five-year special parole term was imposed (Pet. App. B1-B4).

1. The factual background of petitioner's case is as follows. In early January 1981, Joe Frontiera, a confidential informant, told Michigan State Police Sergeant Robert Bertee that Ronald Conn, one of petitioner's co-conspirators, was involved with others in the cocaine business and in the manufacture of phencyclidine, a controlled substance (1 Tr. 19; 2 Tr. 181-182).[1] In February 1981, another confidential informant introduced Sergeant Bertee, acting in an undercover capacity, to Conn (2 Tr. 182). At that first meeting, Conn and Bertee discussed the possibility of Bertee's purchasing cocaine from Conn and of Conn's purchasing piperidine from Bertee (1 Tr. 6-9).[2] On February 4, Bertee purchased cocaine from petitioner and Conn (1 Tr. 23-36). Bertee recognized petitioner as someone who was present during his first meeting with Conn and who answered Conn's telephone during Bertee's aborted first attempt to purchase cocaine from them (1 Tr. 6, 10, 17, 24).

Between February 4 and 26, Bertee had several conversations separately with petitioner and Conn regarding Bertee's purchase of a large quantity of cocaine and the purchase by petitioner and Conn of piperidine from

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[1] "Tr." refers to the trial transcript.

[2] Piperidine is a chemical used in the manufacture of phencyclidine (1 Tr. 5). See 21 U.S.C. (Supp. V) 841(d).

Bertee (1 Tr. 37-40). On February 26, Bertee met petitioner and discussed the proposed transactions, and petitioner provided Bertee with a sample of cocaine (1 Tr. 42-52). On March 11, pursuant to the plan to manufacture phencyclidine, Bertee gave petitioner a half-gallon of piperidine (1 Tr. 1-9, 55-63; 5 Tr. 578-587).

Bertee was subsequently informed by petitioner that he was going to Florida in early April to obtain the kilogram of cocaine they had previously discussed. On April 1, 1981, Conn told Bertee that petitioner was in Florida to pick up the cocaine (2 Tr. 83). On April 2, petitioner telephoned from Florida to notify Bertee that he would be returning the next day (2 Tr. 84).

On April 3, Bertee began recording his phone conversations with the subjects of the investigation (2 Tr. 85). He spoke to petitioner, petitioner's girlfriend, and Conn, all of whom advised him of petitioner's progress in Florida and his return date (2 Tr. 93-95, 112-113, 123-126). On April 4, petitioner delivered a kilogram of cocaine to Bertee and a DEA agent (2 Tr. 165-173). The officers then arrested petitioner, and a search warrant was executed for Conn's residence (2 Tr. 165-173).

2. On appeal, petitioner raised numerous issues, including those presented in his petition. The court of appeals rejected all of petitioner's contentions as nonmeritorious, except his claim that he should have been permitted to examine Conn, who was subpoenaed by the defense but refused to testify on Fifth Amendment grounds and whose out-of-court statements were admitted under the co-conspirator rule. Fed. R. Evid. 801(d)(2)(E). Although holding that Conn should have been required to assert the privilege with respect to particular questions, the court of appeals held that no "fundamental rights were affected" by the error because Conn's hearsay statements were "few and cumulative to the overwhelming evidence against [petitioner]" and because petitioner's entrapment defense was

"specious" since the criminal offenses upon which petitioner was indicted occurred months after his last contact with Frontiera, who petitioner alleged had entrapped him (Pet. App. A11).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review by this Court is accordingly not warranted.

1. Petitioner first argues (Pet. 20-26) that the district court committed reversible error by permitting Conn's attorney to assert the Fifth Amendment privilege on his client's behalf instead of requiring Conn, who was physically incapacitated, to assert the privilege with respect to particular questions. As the court of appeals' recognized (Pet. App. A10), a witness generally should not be permitted to rest upon a blanket claim of Fifth Amendment privilege. See *Hoffman* v. *United States*, 341 U.S. 479, 486-487 (1951). But, as the transcript excerpt quoted in the petition (Pet. 22-23) makes clear, petitioner did not object on this ground to the procedure followed by the district court.[3] Instead, petitioner argued that Conn could not claim the privilege at all because he had pled guilty to the indictment and that Conn should be required to assert the privilege in the presence of the jury (8 Tr. 1112). Neither of these arguments is valid. Because of the risk of prosecution for other related federal and state offenses, Conn's guilty plea did not preclude assertion of the privilege. And a witness need not assert the privilege in the jury's presence, because the assertion of the

[3] Moreover, at trial, petitioner asserted only his right to compulsory process, claiming the need to call Conn to bolster his entrapment defense (8 Tr. 1112-1113; 9 Tr. 1144-1145). Petitioner did not suggest that he wished to confront Conn about his coconspirator statements.

privilege, while of no evidentiary significance, can be highly prejudicial. *United States* v. *Lyons*, 703 F.2d 815, 818-819 (5th Cir. 1983); *United States* v. *Johnson*, 488 F.2d 1206, 1211 (1st Cir. 1973). See also *Namet* v. *United States*, 373 U.S. 179, 186 (1963); *United States* v. *Nunez*, 668 F.2d 1116, 1123 (10th Cir. 1981); *Bowles* v. *United States*, 439 F.2d 536, 541 (D.C. Cir. 1970), cert. denied, 401 U.S. 995 (1971). But see *United States* v. *Vandetti*, 623 F.2d 1144, 1147 (6th Cir. 1980) (calling witness who will assert privilege sometimes permitted, but request must be closely scrutinized).[4]

While it may be true that courts should not ordinarily accept blanket assertions of the privilege, we cannot agree that it was error to adopt such a procedure in the absence of objection from the parties. While petitioner evidently wished to have Conn's assertion of the privilege overridden entirely, it may have been perfectly clear to him that, failing that, all the questions he intended to propound properly could be—and in fact would be—resisted on the basis of the privilege. Thus, his failure to request that Conn be brought before the court to invoke his privilege in response to specific questions can properly be treated as a recognition that such a procedure would have been wasteful and fruitless.

But even if the court should have insisted on such a procedure sua sponte, the court of appeals was correct in its fact-bound conclusion that any error did not affect petitioner's substantial rights so as to justify reversal under Fed. R. Crim. P. 52(b) as plain error. See *United States* v. *Frady*, 456 U.S. 152, 163 (1982). Indeed, it seems clear that reversal would not have been justified even if petitioner had preserved his claim by

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[4] The district court in fact stated that it would consider requiring Conn to assert the privilege in the jury's presence if petitioner provided authority for that procedure, but petitioner failed to do so (8 Tr. 1112-1116; 9 Tr. 1145).

appropriate objection, since any error was harmless when viewed in the context of the entire trial.

Petitioner has contended that Conn's testimony could have helped him in two ways. First, at trial, petitioner claimed only that Conn's testimony would corroborate his entrapment argument (8 Tr. 1112-1113). Petitioner asserts (Pet. 11-12) that he was initially unwilling to engage in any narcotics scheme and had even returned marijuana that he had agreed to sell. He claims (Pet. 12) that he was "prevailed upon by Fronteira [*sic*] and Conn to be involved in the selling of drugs." However, petitioner's own testimony at trial supports the court of appeals' conclusion that petitioner's entrapment defense was "specious" (Pet. App. A11). Petitioner did not return the marijuana because he was unwilling to engage in illegal conduct but rather because he was unable to sell the cocaine as quickly as Frontiera urged. As petitioner testified (7 Tr. 897): "[It] just seemed like he was putting me through too much, too many changes to make it worth my while." Further undercutting petitioner's alleged entrapment by Frontiera was petitioner's acceptance of a role in another marijuana scheme when he arrived to return the marijuana he felt too pressured to sell (8 Tr. 897-898). Upon completion of that marijuana deal, petitioner agreed to try "moving" some cocaine (8 Tr. 898-899). Furthermore, petitioner never hesitated to participate in Frontiera's narcotics ventures. And, as the court of appeals correctly observed (Pet. App. A11), the events for which petitioner was indicted occurred months after his last encounters with Frontiera, and any alleged entrapment in early drug activities did not taint the events at issue here.

Second, even assuming that petitioner had intended to confront Conn about the co-conspirator statements admitted through Bertee's testimony (see page 4 note 3, *supra*), his inability to do so was not prejudicial in light of what petitioner concedes is the "overwhelming

evidence against him" (Pet. 31). The principal evidence at trial was the testimony of two Michigan state police officers and one DEA agent who dealt directly with petitioner in an undercover capacity (1 Tr. 4-68; 2 Tr. 74-181; 3 Tr. 341-370; 4 Tr. 393-412, 506-520). The officers testified about their purchases of cocaine from petitioner, the delivery to him of a half-gallon of piperidine, and numerous telephone conversations about these transactions. In the face of this testimony, Conn's co-conspirator statements were, as the court of appeals correctly concluded (Pet. App. A11), "few and cumulative."

2. Petitioner next contends (Pet. 35-50) that he was denied his right to confront Frontiera, the government informant. But since Frontiera was not called by the government and no statements made by him were admitted in the government's case, petitioner was not denied the right to confront one of the witnesses against him. Assuming that petitioner's real objection is that he was denied the right of compulsory process, that contention is also without merit.

Petitioner intended to call Frontiera to corroborate his entrapment testimony (Pet. App. A2). Because Frontiera had been indicted on unrelated charges and petitioner did not want to jeopardize Frontiera's Fifth Amendment privilege, petitioner moved under Fed. R. Evid. 611 for a preliminary ruling limiting the scope of the prosecution's cross-examination to the scope of the direct examination (8 Tr. 1098-1101). The district court quite reasonably declined to rule on that motion without knowing what questions would be asked (8 Tr. 1100). During a voir dire examination, Frontiera indicated that he would assert his privilege and refuse to answer any potentially incriminating question unless the court granted him "full immunity" (Pet. App. A3; 8 Tr. 1105). Despite the district court's explicit invitation, petitioner's counsel refused to pose any specific

questions; defense counsel merely assured the district court that no direct questioning would implicate the privilege (Pet. App. A3-A4; 8 Tr. 1106). Under these circumstances, the court correctly refused to restrict cross-examination.

Cross-examination properly includes not only "the subject matter of the direct examination," but also "matters affecting the credibility of the witness" (Fed. R. Evid. 611(b)), which is "a very fertile field" (*United States* v. *Raper*, 676 F.2d 841, 847 (D.C. Cir. 1982)). It is well settled that "a defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination." *McGautha* v. *California*, 402 U.S. 183, 215 (1971). Similarly, the privilege cannot be used to limit the government in its cross-examination of defense witnesses to those portions of an event that are favorable to the defense. See *United States* v. *Raper*, *supra*, 676 F.2d at 847.

It is also well established, as petitioner himself argued on appeal with respect to Conn, that a district court generally may not rule on a witness's claim of the Fifth Amendment privilege until the witness has asserted the privilege in response to a particular question. The refusal by petitioner's counsel to proffer his questions to Frontiera deprived the district court of the opportunity to consider whether they might provoke a valid claim of privilege on either direct or cross-examination. Petitioner cannot now claim that the court's failure to rule deprived him of any right. Any deprivation was entirely self-inflicted.[5]

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[5] Moreover, the claim that Frontiera would corroborate petitioner's entrapment defense is not persuasive in the face of this record. The pivotal issue in an entrapment defense is whether the defendant was predisposed to commit the offense charged. *Hampton* v. *United States*, 425 U.S. 484 (1976); *Sherman* v. *United States*, 356 U.S. 369 (1958); *Sorrells* v. *United States*, 287 U.S. 435 (1932). As already noted, see page 6, *supra*, petitioner's own testimony effectively settled that issue.

Moreover, the question whether to limit the scope of cross-examination is entrusted to the trial court's discretion. See *United States* v. *Raper*, *supra*, 676 F.2d at 846; Fed. R. Evid. 611(b). The court of appeals correctly ruled that there was no abuse of discretion here.

3. Petitioner also challenges (Pet. 50-58) the district court's admission of his co-conspirators' statements. In particular, he argues that the evidentiary predicate for the admission of such statements in the Sixth Circuit differs from the standard used by other courts of appeals. But since the statements at issue in this case would have been admissible under the test employed by any court, there is no need for review by this Court.

Almost all the courts of appeals that have addressed the issue do not admit co-conspirator statements into evidence without a showing by a preponderance of the evidence independent of such statements (1) that a conspiracy existed; (2) that the declarant and the defendant against whom the statement is admitted were both members of the conspiracy; and (3) that the statement was made in furtherance of the conspiracy. See *United States* v. *Nardi*, 633 F.2d 972, 974 (1st Cir. 1980); *United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970); *Government of Virgin Islands* v. *Dowling*, 633 F.2d 660, 665 (3d Cir.), cert. denied, 449 U.S. 960 (1980); *United States* v. *Gresko*, 632 F.2d 1128, 1131 (4th Cir. 1980); *United States* v. *James*, 590 F.2d 575 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979); *United States* v. *Regilio*, 669 F.2d 1169, 1174 (7th Cir. 1981), cert. denied, 457 U.S. 1133 (1982); United States v. *Bell*, 573 F.2d 1040, 1044 (8th Cir. 1978); *United States* v. *Petersen*, 611 F.2d 1313, 1327 (10th Cir. 1979), cert. denied, 447 U.S. 905 (1980); *United States* v. *Jackson*, 627 F.2d 1198, 1213-1220 (D.C. Cir. 1980). The Ninth Circuit requires evidence sufficient to establish a prima facie case. *United States* v. *Miranda-Uriarte*, 649 F.2d 1345, 1349 (1981).

The Sixth Circuit employs the preponderance-of-the-evidence test but permits the trial court to consider the co-conspirator statements themselves when making its determination. *United States* v. *Vinson*, 606 F.2d 149, 153 1979), cert. denied, 444 U.S. 1074, 445 U.S. 904 (1980).

In this case, the record does not show what test the district court applied (see 6 Tr. 863-864). It is clear, however, that there was sufficient independent evidence to establish the existence of the conspiracy and that the statements consequently would have been admissible in any circuit. The government's principal witnesses, state and federal undercover officers, testified in detail about the co-conspirators' activities and petitioner's admissions. Indeed, in another context, the court of appeals described the statements of Conn, the principal co-conspirator, as "few and cumulative" (Pet. App. A11).

4. Finally, petitioner maintains (Pet. 58-63) that the admission into evidence of the weapons discovered in a court-authorized search of Conn's residence was error. However, the court of appeals correctly upheld their admission on the grounds that weapons are "tools of the [narcotics] trade" and that the existence of the weapons was relevant to both the magnitude of the enterprise and the co-conspirators' resolve (Pet. App. A13). See *United States* v. *Marino*, 658 F.2d 1120 (6th Cir. 1981).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

GLORIA C. PHARES
Attorney

SEPTEMBER 1983